STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
LIONEL A. CUSH,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2007CF0960
	)	EEOC NO(S): 21BA70098
and	)	ALS NO(S): 07-838
	)	
ELLISON TECHNOLOGIES, INC.,	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8b-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 23rd day of August 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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Complainant,	) **CHARGE NO.: 2007CF0960**
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ELLISON TECHNOLOGIES, INC.,	)
Respondent.	)

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing on the merits of the Complaint held on October 13, 2009. Complainant appeared *pro se*; Respondent was represented by counsel. At the close of Complainant's case in chief on liability, Respondent made a motion for a directed finding, which I granted.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter and is, therefore, named herein as an additional party of record.

CONTENTIONS OF THE PARTIES

Complainant contends that Respondent subjected him to sexual harassment and harassment based on his national origin and that Respondent discharged him based on his national origin and in retaliation for having complained of sexual harassment, in violation of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (Act)

Respondent contends that Complainant did not establish that he was subjected to sexual harassment or harassment based on his national origin nor did he establish a *prima facie* case of discriminatory discharge or retaliation.

FINDINGS OF FACT

1. Complainant filed a *Charge of Discrimination* (Charge) with the Illinois Department of Human Rights (Department) on October 16, 2006. Complainant, on his own behalf, filed a Complaint with the Illinois Human Rights Commission (Commission) on November 1, 2007.
2. Respondent is a provider of advanced machining solutions to North American metal-cutting manufacturers and their global affiliates. Respondent has 19 locations across the United States. Respondent hired Complainant as a Service Engineer to work at its Warrenville, Illinois location on July 12, 2004.
3. Rick Lewitke held the position of Service Manager and was Complainant's immediate supervisor at all relevant times.
4. At some point in time, Lewitke massaged Complainant's shoulders in the workplace.
5. Complainant requested and was granted permission from Respondent to take discarded materials from the workplace, such as Plexiglas and Lexan.
6. Norb Ciric, a co-worker of Complainant, at some point in time, referred to Complainant as *garbage man* and *gypsy*.
7. Complainant was discharged on August 31, 2006.

CONCLUSIONS OF LAW

1. Complainant is an *employee* and Respondent is an *employer* in accordance with the Act at Section 5/2-101.
2. The Commission has jurisdiction over the parties and subject matter in this case.
3. Complainant failed to prove by a preponderance of the evidence that he was subjected to sexual harassment or national origin harassment.
4. Complainant failed to demonstrate a *prima facie* case as to his claims of discriminatory discharge and retaliatory discharge.

DETERMINATION

Respondent's motion for a directed finding should be granted due to Complainant's failure to put forth evidence, more that a scintilla, on each element of his causes of action. *Happel v. Mecklenburger*, 101 Ill. App. 3d 107, 427 N.E.2d 974 (1st Dist. 1981).

DISCUSSION

Respondent is a provider of advanced machining solutions to North American metal-cutting manufacturers and their global affiliates. Respondent has 19 locations across the United States. Respondent hired Complainant as a Service Engineer to work at its Warrenville, Illinois location on July 12, 2004. At all relevant times, Rick Lewitke held the position of Service Manager and was Complainant's immediate supervisor.

A Complainant bears the burden of proving discrimination by the preponderance of the evidence. Section 5/8A -102 (I) (1) of the Act. That burden may be satisfied by direct evidence that adverse action was taken for impermissible reasons or through indirect evidence in accordance with the method set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, 93 S. Ct. 1817 (1973), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089 (1981). This method of proof has been approved by the Illinois Supreme Court and adopted by the Commission in *Zaderaka v. Illinois Human Rights Commission*,131 Ill. 2d 172, 545 N.E.2d 684 (1989).

Under this three-step approach, a complainant must first establish a *prima facie* case of unlawful discrimination. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action. Once the respondent successfully makes this articulation, the presumption of unlawful discrimination drops and the complainant is required to prove, by a preponderance of the evidence, that the respondent's articulated reason is a pretext for unlawful discrimination.

Complainant's Complaint alleges four counts of discriminatory conduct. Each count is addressed separately.

Sexual Harassment

Count One alleges that from July 12, 2004 through August 31, 2006, Lewitke sexually harassed Complainant by touching Complainant in a sexually offensive manner, massaging Complainant's back, and touching Complainant's legs and body inappropriately.

The Act at Section 5/2-101(E) defines sexual harassment as follows:

> "Sexual harassment" means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

For this count, Complainant presented evidence at the hearing relating to subparagraph three above. By definition then, liability would attach to Respondent if Complainant established that he was subjected to: (1) unwelcome conduct of a (2) sexual nature (3) that interfered with his work performance or created an intimidating, hostile, or offensive working environment. *Kauling-Schoen v. Silhouette Health Spas,* IHRC, ALS No. 2918(M), February 8, 1993 and *Harris v. Forklift Systems, Inc.,* 114 S. Ct. 367, 370 (1993).

In *Harris*, the U.S. Supreme Court, in examining the question as to whether a work environment has been rendered hostile or abusive, cited as significant factors, the frequency of the discriminatory conduct, the severity of the conduct, the physically threatening or humiliating nature of the conduct and the interference of the conduct on the employee's work performance. The Commission has specifically relied upon the *Harris* standard when considering claims. See, *Davenport and Hennessey Forrestal*

Illinois, Inc., IHRC, ALS No. 3751, March 30, 1998 and *Trayling v. Board of Fire and Police Commissioners* , 273 Ill. App. 3d 1, 652 N.E.2d 386, 394 (2nd Dist. 1995).

Complainant's claim of sexual harassment fails because of his failure to put forth sufficient evidence to support his claim. Complainant testified that Lewitke, his immediate supervisor, massaged Complainant's back many times while Complainant was on his knees working on the machines in the workplace. Complainant testified that at one point in time, Lewitke tried to give him a back massage and Complainant told him, "Enough!" Complainant said that Lewitke then asked him, "Why don't you like me anymore?" and Complainant responded, "I am here to work, not to like anybody, to work." Complainant said that Lewitke then pounded the garage door with his fists.

Other than this sparse testimony, Complainant failed to put forth any specific evidence as to when any of the alleged occurrences took place or as to the circumstances surrounding any of these alleged events. I specifically considered that Complainant's response was rambling and appeared to be deliberately vague when I prompted him from the bench to try to establish a time line when he allegedly told Lewitke "Enough!" when Lewitke began to massage his back. I find Complainant's vague, rambling and non-specific testimony on this issue to weigh heavily against his credibility.

Notwithstanding, I find credible Complainant's testimony that, at some point in time, Lewitke massaged his back; however, what is missing in the record is sufficient foundational evidence as to the frequency of the conduct, the severity of the conduct, and the physically threatening or humiliating nature of the conduct. Pursuant to the *Harris* standard, an analysis of such evidence would be required to make a determination of whether this specific conduct rose to the level of hostile or abusive within the Act. Complainant's evidence on this issue is woefully inadequate to make such an analysis. Thus, Complainant's claim of sexual harassment fails.

Harassment Based on National Origin

Next, Complainant alleges that he was subjected to harassment based on his national origin - Romania. The Commission has previously held that racial harassment is the result of a hostile working environment in which racially charged verbal or non-verbal behavior is directed toward an employee. This harassment becomes an adverse term or condition of employment for the employee and this constitutes unlawful discrimination. Harassment is a *per se* violation and requires direct evidence of the alleged discriminatory act. *Crider and Illinois Department of Veterans' Affairs*, IHRC, ALS No. 1022(Y), July 24, 1986 and *Hill and Peabody Coal Co.* IHRC, ALS No. 6895(S), June 26, 1996. Harassment on the basis of national origin also has been held to be a *per se* violation of the Act. *Rys and Palka and ISS Int'l Service System, Inc.*, IHRC, ALS No. 2668, March 13, 1992, *aff'd sub nom ISS Int'l Service System, Inc. v. Illinois Human Rights Commission, 272 Ill.App.3d 969, 651 N.E.2d 592 (1st Dist. 1995).* The Commission's interpretative rules regarding national origin discrimination provide that ethnic slurs and other verbal conduct relating to an individual's national origin constitute harassment when this conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment. *56 Ill. Adm. Code, Ch. XI, Section 5220.900(b)(1)(1986).*

In order to prevail on such a claim, Complainant must prove that he was harassed on the basis of his national origin and that the harassment was so severe or pervasive that it altered the conditions of his employment and created an abusive environment. See, for example, *Hu and Allstate Insurance Co.*, IHRC, ALS No. 6082, June 16, 1995.

Complainant's presentation on this issue consisted solely of his testimony that Norbert Ciric, a co-worker, referred to him as *garbage man* and *gypsy* in the workplace.

Complainant testified that, at some point, Ciric laughed while telling Complainant that Romania was a country full of gypsies.

Here, Complainant's own testimony undermines his claim that the characterization of him as *garbage man* was based on his national origin. Complainant testified that he asked for and received permission to take materials from the workplace that Respondent was throwing away. Complainant said that he used the materials to build things around the house. Complainant specifically mentioned Lexan and Plexiglass as materials that Respondent had discarded that Complainant took home. Based on Complainant's own testimony, it cannot be said that Ciric was not using the term *garbage man* in the context of characterizing Complainant's propensity to scavenge discarded items from the workplace.

As to Complainant's testimony that Ciric told Complainant that Romania was a country full of gypsies, the evidence here is simply insufficient to demonstrate that the workplace was permeated with severe and pervasive harassment based on Complainant's national origin.

Complainant identified three times when Ciric made this statement: once in Japan, once at the workplace and once at a customer site. However, Complainant failed to establish specific foundational evidence as to when and where these statements were made or as to the circumstances under which these statements were made. Moreover, Complainant's own testimony in the record establishes Complainant's own belief that any such statements were based in fact. Referring to these statements and to Ciric's characterization of Complainant as *garbage man,* Complainant said,

> And this analogy with me being the garbage man, I make a very straight connection between being from Romania, which has, by the way, the higher—the highest number of Gypsies, and I should call them Roma, because Gypsy, in the Gypsy community, it's considered as the "N" word in the United States. They don't like to be called Gypsies, now they want to be called Roma. (Tr. p. 28, 24, p.29, 1-7).

Complainant further stated,

> So in that regard, I am saying that it's a connection with the national origins because in Romania it's the highest amount of Roma people from the entire Eastern block. (Tr. p. 29, 14-17).

Based on Complainant's testimony – and without additional facts as to the circumstances surrounding the statements – it cannot be said that Ciric made disparaging statements based on Complainant's national origin, rather than factual observations. Notwithstanding, Complainant's testimony on this issue is woefully inadequate to conclude that such references rose to the level of actionable harassment.

For these reasons, Complainant's claim of harassment based on national origin fails.

Discharge Based on National Origin

Complainant's third count alleges he was discharged because of his national origin. Complainant presents no evidence to support a direct case of discrimination; therefore, this claim is analyzed using the *McDonnell Douglas and Burdine* three-part method previously discussed.

To establish his *prima facie* case, Complainant must prove (1) that he is in a protected class, (2) that he was meeting Respondent's legitimate performance expectations,(3) that he was discharged, and (4) that similarly situated employees outside his protected class were treated more favorably. *See*, *Hu and Allstate*, *supra*, and *Shah and Warshawsky & Co.* IHRC, ALS No. 1783, December 6, 1988, *aff'd sub nom Shah v. Illinois Human Rights Commission,* 192 Ill. App. 3d 263, 548 N.E.2d 695 (1st Dist. 1990).

Complainant proved the first and third elements of his *prima facie* case. Complainant testified that he is of Romanian origin, which puts him in a protected class, and that he was discharged on August 31, 2006. However, Complainant failed to

provide sufficient evidence to prove the remaining two elements. First, Complainant submitted no admissible evidence whatsoever to support that he was meeting Respondent's legitimate performance expectations. Second, Complainant failed to identify any similarly situated workers who were treated more favorably than he. Thus, Complainant's claim of discharge based on national origin fails.

Retaliation

Finally, Complainant claims he was discharged on August 31, 2006 in retaliation for having complained about sexual harassment. This claim, too, is analyzed under the *McDonnell Douglas* and *Burdine* three-part method previously discussed. To establish a *prima facie* case of retaliation, Complainant must demonstrate that (1) he engaged in a protected activity that was known by Respondent; (2) Respondent subsequently took some adverse action against him; and (3) there is a causal connection between the protected activity and the disadvantageous employment action. *Pace and State of Illinois, Dept. of Transportation*, IHRC, ALS No. S-5827, August 12, 1996.

Complainant's *prima facie* case here also fails because Complainant failed to establish proper foundation as to when he engaged in any protected activity so that an analysis as to a causal nexus could be made. Complainant's testimony that he told Lewitke "That's enough!" is the only evidence of protected activity and this evidence has been previously found lacking in credibility for Complainant's failure to establish appropriate foundation. Thus, Complainant's claim of retaliatory discharge fails.

Standard for Granting Directed Finding

At the close of Complainant's case-in-chief, Respondent moved for a directed finding. The Commission has the authority to consider and grant motions for directed finding where appropriate. *Sharon Castle and Illinois Veterans' Home at Manteno*, IHRC ALS No. 5347, June 29, 1995; *Anderson v. Human Rights Commission,* 314 Ill.App.3d 35, 731 N.E.2d 371, 246 Ill. Dec. 843, (1st Dist. 2000).

Following such a motion, a two-step analysis must be applied. *Happel v. Mecklenburger*, 101 Ill. App. 3d 107, 427 N.E.2d 974 (1st Dist. 1981). First, a determination must be made as a matter of law whether Complainant has made out a *prima facie* case by having presented some evidence, more than a scintilla, on every essential element of his cause of action. If the fact finder cannot make a finding that Complainant was a victim of discrimination after Complainant has put on his case-in-chief, there is no reason to force Respondent to put on a defense. Thus, the motion should be granted if the *prima facie* case has not been established. *Hernandez and City of Chicago*, IHRC, ALS No. 1649, February 2, 1987.

However, if Complainant has presented some evidence, the evidence must be weighed, including anything favorable to Respondent, credibility must be weighed, reasonable inferences must be drawn, and the weight and quality of the evidence must be considered. If this weighing process results in the negation of evidence necessary to Complainant's *prima facie* case, Respondent is entitled to a judgment in its favor. *Kokinis v. Kotrich*, 81 Ill 2d 151, 407 N.E. 2d 43 (1980).

Thus, the inquiry here concerns whether Complainant has put forth sufficient evidence to prove every element essential to each of his causes of action. As previously discussed, Complainant has failed to meet this burden.

RECOMMENDATION

For the foregoing reasons, it is recommended that this Complaint be dismissed with prejudice in its entirety.

HUMAN RIGHTS COMMISSION

October 28, 2009

SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section